103961-1

No. 84657-4-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

AUSTIN CORNELIUS, an individual,

Petitioner,

v.

STATE OF WASHINGTON d/b/a Washington State University,

Respondent,

and

ALPHA KAPPA LAMBDA, a national organization, ETA CHAPTER OF ALPHA KAPPA LAMBDA, a Washington corporation d/b/a/ ALPHA KAPPA LAMBDA, and ETA OF ALPHA KAPPA LAMBDA, a Washington corporation,

Defendants.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Austin Cornelius asks this Court to review the Court of Appeals decision in Part B.

B. COURT OF APPEALS DECISION

Division I filed its published opinion on January 21, 2025. It denied Austin's motion for reconsideration on February 13, 2025. Copies are in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Where state law and Washington State University's ("WSU") own regulations ban hazing, did the trial court err in ruling that WSU owed no duty to a student for a fraternity's hazing when WSU had a special relationship with that student arising out of the university's provision of the infrastructure for such hazing and its official recognition of the fraternity, and the fraternity's conduct was foreseeable because WSU had previously revoked the fraternity's recognition for its hazing practices that included requiring pledges to drink or use drugs in excess as part of its initiation ritual?

2. Under the terms of RCW 28B.10.901-.902 and WAC 504-26-206 that ban hazing, did a student who is hazed have an implied common law right of action against WSU for its negligence arising out of the violation those anti-hazing statutes and regulations?

3. Where WSU took charge of a fraternity and

thereby owed a duty of care to a student victimized by hazing at WSU, did Division I err in concluding that the student somehow "abandoned" that duty argument when the student fully briefed the duty issue?

D. STATEMENT OF THE CASE

Division I's published opinion offers an abbreviated discussion of the facts/procedure in the case. Op. at 2-3. The Court omitted certain facts that bear emphasis.

In its published opinion, the *Martinez* court correctly noted the extensive requirements WSU imposed on fraternities like AKL in order to be officially recognized such as abiding by WSU alcohol, drug, and anti-hazing policies, and maintenance of minimum GPAs, to name only a few. *Martinez v. Wash. State Univ.*, __ Wn. App. 2d __, 562 P.3d 802 (2025). *See also,* CP 1806-10. But Division I failed to fully acknowledge the symbiotic WSU/fraternity relationship.

Division I asserted that Austin's hazing occurred "off-campus," op. at 1, 11, when Greek Row in Pullman and AKL's Eta Chapter ("Chapter") were in close proximity to the campus,

near to WSU's President's house. CP 1744, 1897.

The Chapter conducted "study tables" at WSU's library and paraded pledges like Austin from the library across the campus to the Eta house as part of its hazing ritual. Br. of Resp't ("BR") 21. It is a reasonable inference from the fact of the cross-campus ritual that the campus community and University officials were well-aware of such an obvious, unusual event that was part of the Chapter ritual *for years*. Clearly, students marching across campus at night in lockstep would hardly be typical and would be noteworthy to any observer including University staff. Moreover, WSU's staff had to be aware of specifically designated Chapter "study tables" on its premises.

Simply put, the Chapter utilized WSU premises for hazing; Austin was not hazed solely at the Chapter house.

Also ignored by Division I was the key fact that WSU has had a symbiotic relationship with Greek fraternities like the Chapter *for years*. WSU benefits from extremely generous contributions from former fraternity members, estimated at $100

million in the period between 2009 and 2019 alone, in the *Martinez* briefing. In turn, the University *promotes* Greek fraternities, and all too often turns a blind eye toward drinking/drugging in those officially-sanctioned student housing organizations that cases like Austin's, Sam Martinez's, or Luke Tyler's, all of whom were injured in a fraternity hazing, fully document. 18 of 18 fraternities in 2013 had alcohol sanctions levied against them. Br. of Appellant ("BA") 59.

WSU's Center for Fraternity and Sorority Life ("CFSL") did not merely provide incoming students with "an overview" of the benefits and risks of Greek life. Rather, it aggressively *promoted* fraternities/sororities with paid staff and a website. BA 3-4. 22% of WSU's students belong to fraternities or sororities. CP 1798. CFSL "advised" an intrafraternity council of Greek Row entities, CP 1799, evidencing the intertwined relationship between WSU and Greek Row. At the time of Austin's hazing, WSU even officially *exempted* students in fraternities from its requirement that first year students must reside on campus, WAC

504-24-030, further promoting fraternities like the Chapter.

If, in fact, the Greek Row fraternities are "private" or "independent" corporations, why is the University hiring a staff of five public employees paid with public funds to promote those allegedly private organizations? *See* Wash. Const. art. VIII, § 5 (barring the lending of the state's credit "in aid of" any corporation).[1]

In return for signing the Relationship Agreement ("RA") with WSU, CP 1800-34, WSU "recognized" the Chapter and provided for *extensive* benefits to it including financial support and access to University facilities/staff. CP 1804, 1806.

[1] Under this Court's gift of public funds protocol, moneys may only be given to private institutions if they are advancing a *public* purpose, here, a WSU purpose. *Peterson v. State, Dep't of Revenue*, 195 Wn.2d 513, 460 P.3d 1080 (2020). To survive a constitutional challenge, the expenditure of public funds to benefit a private concern like the Chapter must carry out a "fundamental purpose of government." If they do not, then courts evaluate donative intent on the government's part, looking to the consideration received by the government from the private organization and the government's donative intent. Either way, presumably all of the staffing/funds WSU spends on fraternities further *WSU's interests*.

In turn, WSU controlled such officially recognized organizations. Fraternities had to abide by various WSU policies, including the student code of conduct and WSU's disciplinary authority. The fraternities could be disciplined by WSU, including non-recognition. CP 1810, 1812. *See, e.g., Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 216 P.3d 451 (2009).

WSU *knew* the Chapter had previously hazed its pledges. Indeed, the Chapter's then "New Member Educator" was arrested for drug dealing. *Alpha Kappa Lambda, supra*. Yet, WSU reinstated the Chapter and did not pay close attention to its hazing conduct that went on presumably for years post-reinstatement. Such fraternity alcohol issues were routine at WSU. *See Dussault v. Wash. State Univ.*, 24 Wn. App. 2d 1043, 2022 WL 17581806 (2022) (unpublished) (2017 alcohol-related injuries of freshman fraternity pledge).

In *Martinez*, Division I held that WSU had a duty of care to students in fraternities under *Restatement* § 315(a), reasoning

that WSU knew about the fraternity's past misconduct, could "identify its potential victims," and "could exercise sufficient control over [the fraternity] to manifest a duty under *Restatement (Second)* § 315(a)." *Id.* at 37-45.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Division I's Opinion on WSU's Special Relationship with Austin Is Contrary to *Barlow*

Division I concluded that WSU did not owe Austin a duty under *Restatement (Second) of Torts* § 344. *See* Appendix. Op. at 6-16. Its opinion contravened this Court's decision in *Barlow v. Wash. State Univ.*, 2 Wn.3d 583, 540 P.3d 783 (2024). In particular, Division I confines the reach of the special relationship between students and higher education institutions to situations where a student is *on campus* for school-related purposes or participating in a school activity, op. at 8, truncating the scope of the duty Court recognized in *Barlow*. There, this Court applied *Restatement* § 344 to conclude that an institution could be liable for harm resulting to students activities on school

premises *or* resulting from school-sponsored activities. 2 Wn.3d at 597-98. The *Barlow* court did not limit an institution's duty to on-campus school-sponsored activities.

A premises owner must *anticipate risk* from third persons to those on its premises and to "police" those premises accordingly. *Restatement* § 344 cmt. f. *McKown v. Simon Property Grp., Inc.*, 182 Wn.2d 752, 768, 344 P.3d 661 (2015) (shopping mall premises owner could be liable under § 344 for shooting that was reasonably foreseeable based on past experience, the place or character of the premises owner's activities or the likelihood of harm there effectuated by third persons. *See also, Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997); *Johnson v. State*, 77 Wn. App. 934, 943, 894 P.2d 1366, *review denied*, 127 Wn.2d 1020 (1995); *Brady v. Whitewater Creek, Inc.*, 24 Wn. App. 2d 728, 749-52, 521 P.3d 236 (2022), *review denied*, 1 Wn.3d 1016 (2023) (prior incidents on premises).

(a) The Chapter Hazed Austin on WSU's Premises

First, Austin was hazed on WSU's premises. WSU's library and campus were used for the Chapter's hazing rituals. Division I was all too eager to exonerate the Chapter from liability under § 344 for hazing that actually occurred on the WSU campus.

WSU was fully aware of hazing generally on its campus and at the Chapter in particular from past experience. WSU officially sponsored or "recognized" the Chapter, promoting "Greek Life" through its CFSL for students like Austin. Higher educational institutions provide an array of educational, living, and social opportunities for students, as this Court is aware. WSU made its facilities like the library available for the Chapter to engage in hazing. Austin and other Chapter pledges were marched from the library across its campus as part of the Chapter's hazing ritual. CP 1744, 1897.

Division I adopted an unduly restrictive view of *Barlow*'s

duty owed to a student on campus "'for school related purposes.'" Op. at 13-14. If organized study sessions at a university-owned, on-campus library have no "school-related purpose," as Division I held, *id.* at 13-14, it is hard to imagine what qualifies. The *Barlow* court made clear that a "school-related purpose" in a university setting involves more than just lectures, labs, and other formal academic classes. The kinds of "nonacademic offerings" on campus that would qualify for "potential liability under *Restatement* § 344," this Court explained, include things like "housing, providing food, opportunities for social interaction." 2 Wn.3d at 597.

But a key factual point that Division I also overlooks is that WSU made fraternities, in effect, a part of its campus. WSU required all freshmen like Cornelius "to live in organized living groups which are officially recognized by the university . . . for one academic year." WAC 504-24-030(2). WSU entered into a University Approved Housing agreement ("UAH") with the Chapter. CP 1673, 1727. In doing so, WSU made the Chapter

eligible to offer "officially recognized" housing to first-year students. WAC 504-24-030(2). Thus, by pledging the Chapter, Cornelius satisfied WSU campus-related requirements for students. The RA's extensive requirements, CP 1806-10, were also met in Austin's case.

Under *Barlow*, eating at an on-campus cafeteria is covered; under Division I's opinion, however, studying in the campus library or living at a WSU approved residential facility in lieu of a WSU-provided residence is not. That opinion cannot be reconciled with *Barlow*, and this Court's review is needed to clarify the legal test for what constitutes a "school-related purpose." In sum, WSU owed Austin a *Restatement* § 344 duty of care arising out of the use of its premises by the Chapter.

(b) The Chapter Was a WSU-Sponsored Entity

WSU also owed a duty to Austin because the Chapter was a "university sponsored activit[y]." *Barlow*, 2 Wn.3d at 587. The *Barlow* court framed WSU's duty to its students in the disjunctive: "the duty exists within the campus confines *or*

university sponsored and controlled events." *Id.* (emphasis added). Division I misapplied this second, alternative prong from *Barlow*.

WSU devoted paid staff to nurture Greek life, including at AKL; allocated campus resources to encourage students to consider joining fraternities; helps organize fraternities' fall "rush" period; and allowed fraternities to use the campus for organized fraternity events where regimented control over freshmen pledges took place. Again, WSU-sponsored activities and information it provided led Austin to pledge a fraternity. CP 1748. He found persuasive WSU's brochures and its website, and he was excited about the "study tables" that WSU permitted at its on-campus library. CP 510, 1748, 1773-74. WSU exercises broad regulatory and disciplinary authority over the off-campus activities at fraternities, as noted *infra*. WSU cannot dedicate so many resources and so much power to nurturing and regulating Greek life and then deny its symbiotic relationship with the Greek system.

Division I brushed aside these facts, believing that no duty arises for universities under *Barlow* "simply because they 'provid[e] basic necessities' such as 'opportunities for social interaction.'" Op. at 11 (quoting 2 Wn.3d at 597). That shrinks *Barlow*. This Court had said only that such "basic necessities" usually are provided on campus. 2 Wn.3d at 597. But this Court never said that a university's involvement with an organization providing such "basic necessities" could *never* support a § 344 duty if it were off campus.

Thus, WSU *approved* the Chapter, giving it official recognition, knowing it offered residential facilities that satisfied an *on-campus* residence mandate. WSU officially encouraged Greek Row housing as part of the University's campus community and devoted official WSU staff to promote Greek Life. It was on notice of the intimate relationship between alcohol and drugs, Greek Life, and the tragic consequences of it having removed AKL's recognition previously, in deaths like those of Sam Martinez and Luke Tyler, and in the harm to people

like Austin. WSU owed Austin a duty of care for hazing that occurred at the Chapter.

Here, unlike in *Barlow,* WSU extensively sponsored and controlled the Chapter, and it *did* have "actual power to thereby control students' actions and sponsored a fraternity's activities at a private off campus residence at the time of the hazing." Op. at 11.

To the extent that any hazing occurred "off-campus," that is not determinative as to the duty analysis because the location of the harm is not crucial where fraternities are WSU school-sponsored activities. *See N.L. v. Bethel School Dist.,* 186 Wn.2d 422, 435, 378 P.3d 162 (2016) (14-year-old student raped far away from campus by another student who was a registered sex offender; "While the location of the injury is relevant to many elements of the tort, the mere fact the injury occurs off campus is not by itself determinative.").

Specifically, this Court has found a school district duty for off-campus hazing by private organizations. *Sherwood v. Moxie*

Sch. Dist. No. 90, 58 Wn.2d 351, 363 P.2d 138 (1961) (off campus letterman's initiation ceremony in public park after school hours); *Chappel v. Franklin Pierce Sch. Dist. No. 402*, 71 Wn.2d 17, 426 P.2d 471 (1967) (club initiation that involved hazing after school hours at family residence of a club member); *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936 (1968) (off campus varsity wrestling match).

Division I's opinion contravenes this Court's discussion of the *Restatement* § 344 duty issue in *Barlow*, meriting review. Because higher education institutions sponsor school-related activities both on and off campus, this Court needs to determine the scope of its decision in *Barlow*. This Court should address and resolve the scope of the *Restatement* § 344 duty it adopted in *Barlow* as to fraternity hazing. This Court should grant review to clarify when a public university's involvement in an off-campus activity–especially officially recognized housing–is enough to trigger a duty of care. RAP 13.4(b)(1). That is especially true for fraternities, or any private groups, that receive

material support in exchange for university oversight, because injuries are widespread. *See, e.g., Dussault*, 2022 WL 17581806.

(c) The Chapter's Hazing of Austin Was Foreseeable

In addition to truncating this Court's § 344-based duty analysis in *Barlow*, Division I improperly treats the determination of foreseeability. Op. at 14-17; *McKown*, *supra*. In the § 344 duty context, WSU was on notice that hazing occurred at the Chapter. Just as it was foreseeable in *N.L.* that a registered sex offender might take a student off campus and rape her, it was foreseeable that the Chapter would again haze pledges requiring them to drink to excess. Moreover, Division I's refusal to treat Austin's hazing as analogous to the Chapter's hazing conduct that caused it to lose WSU's recognition, op. at 15, is puzzling. Both involved alcohol and hazing. That each act of hazing was not identical does not diminish the fact that WSU was on notice of hazing fueled by alcohol. Division I decided the issue of foreseeability as a matter of law, further meriting this

Court's review. RAP 13.4(b)(4).

(2) Division I's Opinion on an Implied Right of Action Is Contrary to Controlling Precedents

Division I rejected an implied right of action in this case, adopting the analysis in *Martinez*. Op. at 3-5. Division I erred, meriting review by this Court. RAP 13.4(b)(1).

Austin has an implied cause of action against WSU for the Chapter's hazing activities arising out of Washington's anti-hazing statute, RCW 28B.10.901, and WSU's own anti-hazing regulation, WAC 504-26-206. *See* RCW 5.40.050 (violation of statute or administrative regulation is evidence of negligence). *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990); *Schooley v. Pinch's Deli Mkt., Inc.*, 131 Wn.2d 468, 951 P.2d 749 (1998); *Tyner v. Wash. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016); *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 680, 398 P.3d 1108 (2017).

Division I focused principally on the second *Bennett*

element, but each merits attention.

Austin Was Within the Protected Class. Since 1993, Laws of 1993, ch. 514, Washington has banned hazing in higher education. RCW 28B.10.901(1); RCW 28B.10.902(1) (participation in hazing requires forfeiture of state-funded grants and scholarships); RCW 28B.10.902(2) (entities engaging in hazing must lose official university recognition); RCW 28B.10.901(2) (criminal penalties for hazing); RCW 28B.10.905 (hazing prevention committees). Similarly, WAC 504-26-206 establishes penalties for any person hazing another. These statutory/regulatory provisions establish a special protected class of persons – hazing victims.

WSU maintains authority to impose sanctions against "registered student organizations that violate university policies and the standards of conduct," WAC 504-26-015(5), and has specifically exerted significant control over AKL and the Chapter. There are at least two known instances in recent history in which WSU has exerted significant authority over the Chapter

and its members. First, in 2007, as discussed in Division I's opinion, and in the present case. Once it was determined that the events Austin reported about AKL were true, WSU sanctioned AKL by again revoking recognition of the Chapter for a period of five years. CP 1884. As of the time of the trial court motions, the Chapter had not applied for renewed recognition, although it became eligible to do so in 2020. In addition to the sanctions imposed upon the Chapter, WSU also sanctioned the Chapter's president, Maxwell Zimmerman.

Austin was within the protected class of RCW 28B.10.901-.902 and WSU's anti-hazing regulation.

The Legislature Intended to Create a Private Remedy. That the Legislature intended to create a private remedy here is documented by the sheer extent of the specific protective provisions in the statute and implementing regulations designed to benefit people like Austin. *Bennett*, 113 Wn.2d at 919-20. It could hardly have created such rights without intending a remedy for their breach. *Lucas Flour Co. v. Local 174, Teamsters*

Chaffeurs, and Helpers of America, 57 Wn.2d 95, 103, 356 P.2d 1 (1960); *Sorenson v. City of Bellingham,* 80 Wn.2d 547, 556, 496 P.2d 512 (1972).

The fact that the Legislature provided a strict liability remedy against fraternities themselves in RCW 28B.10.901(3) if they knowingly engage in hazing and also makes corporate directors of fraternities liable does not mean the Legislature intended to deprive hazing victims of a remedy against the higher education institution. In *Swank*, this Court found an implied right of action despite the fact that Legislature addressed liability-related issues like immunity in the Lystedt law. 188 Wn.2d at 678-79. Addressing civil remedies in part in a statute does not mean that the Legislature intended to foreclose an implied right of action for violation of other facets of the statute.

An Implied Cause of Action Advances the Purpose of the Anti-hazing Statute and WSU's Regulation. The Legislature intended that hazing end. That policy applies with no less force to institutions like WSU if they tolerate a culture by

their Greek Row entitles that are *promoted* by the University to students as a viable housing alternative.

Greek Row fraternities benefit institutions like WSU. Fraternity alumni provide more donations to institutions than non-Greek alumni. They are a powerful political network influencing not only the administration of higher education institutions, but legislative bodies as well. Justin J. Swofford, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, 45 J.C.U.L. 296, 298-99 (2020). If the clear anti-hazing policy envisioned by the Legislature is to be enforced maximally, higher education institutions themselves must be subject to liability, unfiltered by their conflict of interest in promoting "Greek life" and the financial and political influence of fraternity alumni.

The existence of a private right of action, as in *Swank*, is clearly essential to effectuate the anti-hazing public policy envisioned by the Legislature in 1993 and later expanded in 2020, and WSU's own anti-hazing regulations.

Review of the implied right of action issue is merited. RAP 13.4(b)(1), (4).

(3) Division I's Opinion Is Contrary to Basic Fairness and Contravenes Case Law on Concessions or Abandonment of Claims

Division I's opinion deviated from the basic fairness contradicting well-established law on "concessions" or "abandonment" of claims. Despite the factual similarities to *Martinez*, there is no principled reason why Austin should not be entitled to the same protections as Sam Martinez. The overriding directive of the RAPs is to do justice. RAP 1.2(a). Review is critical. RAP 13.4(b)(4).[2]

In a hyper-technical procedural "gotcha," Division I found that Austin's briefing did not preserve his *Restatement* § 315 argument or that Austin "conceded" that *Restatement* § 315(a) did not apply, thereby "abandoning" the issue. Op. at 3-4 n.3.

[2] Division I summarily denied Austin's motion for reconsideration that brought the basic unfairness of its decision to its attention.

The court based that latter notion on a statement by Austin's attorney answering a question about whether *Restatement* § 315(a) could support a duty of care after this Court's *Barlow* decision; counsel responded that he could not envision such a circumstance. Op. at 3 n.2. But what counsel might envision this Court might do does not equate to a "concession" or an "abandonment" of a client's theory.

Austin pleaded a single cause of action, negligence, in his complaints. CP 8-9, 19-21.[3] He *never* confined that negligence argument to particular *Restatement* provision, in keeping with Washington's notice pleading standard. *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 183, 375 P.3d 1035 (2016). His pleadings alleged broadly that WSU owed a duty of care to all students, and he argued several ways in which WSU had breached that duty.

[3] Division I's harsh sensibility about Austin's preservation of the *Restatement* § 315 argument stands in stark contrast to its more liberal treatment of the preservation of the *Restatement* § 344 duty. Op. at 6 n.3. *Both theories* were fully briefed for that court.

CP 1694-1721. He specifically argued a *Restatement* § 315(a) duty, CP 1715, and later in his opening appellate brief. BA 33-44.

In post-*Barlow* supplemental briefing, Austin *nowhere* "abandoned" any facet of his duty argument. He referenced *Martinez*, Am. Br. of Appellant ("ABA") at 1 n.1, and argued that WSU owed a duty to him, pointing again to WSU's control over the Chapter and its support for the Chapter and other fraternities. ABA 33, 48-56. He rejected any claim that he "abandoned" any duty argument, Reply Br. ("RB") 13-16, and again referenced *Martinez*. *Id*. at 2 n.1.

The central thrust in Austin's briefing has been that WSU's relationship with the Chapter was such that it had enough knowledge, control, and material support for fraternities like the Chapter that a protective duty of care arose. ABA 5-6, 33, 42, 47-55.

Counsel's statement at oral argument was an *observation*, not a concession. If the colloquy at oral argument were deemed

a "concession" that *Barlow* foreclosed a protective duty of care under *Restatement* § 315(a), Division I should not have accepted that observation as a concession.

Concessions about *legal questions* are not binding on appellate courts. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 734, 222 P.3d 791 (2009); *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995); *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). *See also*, *In re J.F.*, 109 Wn. App. 718, 721, 732, 37 P.3d 1227 (2001).

As it misapplied case law on concessions, Division I erred in its treatment of claim abandonment. Op. at 3 n.2. Abandonment has a particular meaning, applying only to claims and affirmative defenses, not to legal arguments supporting those claims or defenses. *See Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978); *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006); *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602 n.3, 277 P.3d 670, 672 (2011); *Blue Spirits*

Distilling, LLC v. Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 794, 478 P.3d 153 (2020).

In *Blue Spirits*, cited by Division II, the court considered whether a distillery had abandoned its claim for a refund for a 10% fee that it had paid to the State under a regulation that the appellate court later invalidated, 15 Wn. App. 2d at 783, 794-95, and concluded that the distillery had not abandoned the claim. *Id.* at 794-95. In its analysis, the court didn't pick apart the distillery's legal arguments or survey the specific legal authorities that it cited. Rather, the court considered only whether the distillery had continued to press its claim. *Id.*

Austin never "abandoned" his negligence claim. As noted *supra*, Austin pleaded a single cause of action for negligence. CP 8-11. His complaint never broke up his negligence action into different negligence claims. *Id.* Nor did his complaint treat his cause of action as if Washington were a code pleading state, in which case he would have had to plead in technical detail all the different applicable *Restatement* sections supporting a duty of

negligence. Instead, he alleged a single cause of action, maintaining that WSU had a general duty of care to him for his hazing while at the Chapter.

Ultimately, in *Martinez*, Division I disagreed with Austin's counsel about the law, differentiating between *Barlow*—which concerned WSU's exercise of control over an *individual*, the perpetrator in *Barlow*—and a circumstance where a public university had an ongoing relationship with an *organization*, such as the fraternity in *Martinez* and the chapter here. *Martinez*, 562 P.3d at 820-23. The *Martinez* court noted that WSU provided ongoing material assistance to the fraternity and had contracts giving it control over the fraternity's activities. *See id.* at 822-23. Like Austin's situation that relationship with *Martinez* was markedly different from WSU's relationships with its other 20,000 undergraduate students. Like the fraternity in *Martinez*, WSU entered into a UAH with the Chapter in this case. CP 1673, 1727. As noted in *Martinez*, WSU freshmen generally "are required to live in organized living groups which are

officially recognized by the university … for one academic year." WAC 504-24-030(2). By signing a UAH, the fraternities in *Martinez* and in this case became eligible to offer housing to first-year students—a huge boost for their recruitment. Also like the fraternity in *Martinez*, the Chapter here had a RA with WSU, CP 1800-34, that involved extensive mandatory requirements. CP 1806-10.

As with the fraternity in *Martinez*, 562 P.3d at 832-24, WSU was able to "closely monitor" the Chapter here to ensure compliance with the RA/UAH, which included WSU's anti-hazing policy. CP 1818, 1820. As in *Martinez*, WSU "could regulate [the Chapter's] conduct by written warnings, reprimands, educational programming, restitution for property damage, monetary fines, probation, suspension, temporary organizational suspension, withdrawal of recognition, or withdrawal of first-year housing privileges." *Martinez*, 562 P.3d at 823; CP 1806-10. CP 1800-34. As in *Martinez*, WSU also had the power to sanction the chapter for violating the RA by

withdrawing official recognition. WAC 504-26-425(4)(b). Given these identical circumstances, the same legal conclusion should be drawn from WSU's agreement with the Chapter, a standard contract between WSU and all recognized fraternities. *Id.*

Austin never conceded nor "abandoned" his negligence claim or the point that WSU owed him a duty of care. Review is merited. RAP 13.4(b)(1), (2), (4).

F. CONCLUSION

This Court needs to be the ultimate word on any duty owed by higher education institutions to students hazed by fraternities officially recognized by those institutions. This Court should grant review of Division I's published opinion and reverse the trial court's decision dismissing Austin's action. Costs on appeal should be awarded to Austin Cornelius.

This document contains 4,774 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 12th day of March, 2025.

Respectfully submitted,

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APPENDIX

Restatement (Second) of Torts § 344:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
(a) discover that such acts are being done or are likely to be done, or
(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

RCW 28B.10.900:

any act committed as part of a person's recruitment, initiation, pledging, admission into, or affiliation with a student organization, athletic team, or living group, or any pastime or amusement engaged in with respect to such an organization, athletic team, or living group that causes, or is likely to cause, bodily danger or physical harm, or serious psychological or emotional harm, to any student or other person attending a public or private institution of higher education or other postsecondary educational institution in this state, including causing, directing, coercing, or forcing a person to consume any food, liquid, alcohol, drug, or other substance which subjects the person to risk of such harm, regardless of the person's willingness to participate.

RCW 28B.10.901:

(1) No student, or other person in attendance at any public or private institution of higher education, or any other postsecondary educational institution, may intentionally haze another.

(2)(a) Except as provided in (b) of this subsection, a violation of subsection (1) of this section is a gross misdemeanor, punishable as provided under RCW 9A.20.021.

(b) A violation of subsection (1) of this section that causes substantial bodily harm, as defined in RCW 9A.04.110, to another person is a class C felony.

(3) Any student organization, association, or student living group that permits hazing is strictly liable for damages caused to persons or property resulting from hazing. If the student organization, association, or student living group is a corporation whether for profit or nonprofit, the individual directors of the corporation may be held individually liable for damages.

RCW 28B.10.902:

(1) A person who participates in the hazing of another shall forfeit any entitlement to state-funded grants, scholarships, or awards for a period of time determined by the institution of higher education.

(2) Any organization, association, or student living group that knowingly permits hazing to be conducted by its members or by others subject to its direction or control shall be deprived of any official recognition or approval granted by a public institution of higher education.

(3) The public institutions of higher education shall adopt rules to implement this section.

FILED
1/21/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AUSTIN CORNELIUS, an individual, Appellant, v. WASHINGTON STATE UNIVERSITY, a public university, Respondent, ETA OF ALPHA KAPPA LAMBDA, a Washington corporation d/b/a ALPHA KAPPA LAMBDA, and ALPHA KAPPA LAMBDA, a national organization, MAXWELL H. ZIMMERMAN; JOHN STACK; KYLE THOMAS CATEY; MICHAEL GRAY; JOHN ZENDER; ADAM TAPLETT; DEREK ANDREW THIEL; AND DOES 1 THROUGH 15,[†] Defendants.	No. 84657-4-I DIVISION ONE PUBLISHED OPINION

DÍAZ, J. — Austin Cornelius brought suit against Washington State University (WSU) for hazing he alleges largely occurred at an off campus fraternity. A superior court granted summary judgment in favor of WSU, holding it owed

[†] The appellant settled his claims against both Alpha Kappa Lambda's national organization and its Washington State University chapter in October 2022. The court also dismissed all claims against the remaining defendants by June 2022. Thus, only Austin Cornelius and Washington State University are participating in this appeal.

Cornelius no duty to protect him from such hazing and dismissing his claims. Cornelius now argues Washington's anti-hazing statutes and regulations create an implied private right of action sounding in tort, i.e., permitting him to sue WSU for negligence. Cornelius also argues WSU owed him a common law duty of care under Restatement (Second) of Torts § 344 (Am. Law Inst. 1965). Under either theory, we hold Cornelius fails to establish a genuine issue of material fact as to whether WSU owed him the duties he claims it breached, i.e., to monitor and prevent hazing. As such, we affirm the superior court's order of summary judgment in favor of WSU.

I. BACKGROUND[1]

In August 2017, Cornelius enrolled at WSU as a freshman. Soon after, Cornelius sought to join or "pledge" Alpha Kappa Lambda fraternity's WSU chapter (the AKL Chapter), whose house was located off campus, though "physically proximate" to campus, in an area commonly known as Greek row.

Cornelius claims members of the AKL Chapter hazed him in the months that followed. For example, he claims AKL members once forced him to drink so much alcohol that he was hospitalized. These incidents of excessive drinking and other types of hazing almost exclusively occurred off campus, such as at parks or the AKL Chapter's house. As to the only incident(s) that occurred on campus, he claims members of the AKL Chapter forced pledges to march from "study tables"

[1] The superior court resolved this matter on summary judgment. Thus, the facts herein are set forth in the light most favorable to Cornelius, the non-moving party, based on the evidence he submitted on summary judgment. See Blue Diamond Grp., Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

at a WSU library to the AKL Chapter house, there to be hazed.

In October 2017, Cornelius reported this hazing to WSU. After an investigation, WSU revoked its recognition of the AKL Chapter in December 2017 until at least May 2020.

In July 2020, Cornelius filed suit in the King County Superior Court. Cornelius brought claims of negligence against inter alia WSU, asserting it "owes a duty of care to the students who attend its University." In September 2022, WSU moved for summary judgment. WSU primarily argued it "did not owe any legal duty to protect Plaintiff [Cornelius] from the illegal conduct of adults at a private, off campus establishment." In October 2022, the superior court granted summary judgment for WSU.

Cornelius timely appealed and, in March 2023, this court stayed proceedings pending our Supreme Court's decision in Barlow v. State, 2 Wn.3d 583, 540 P.3d 783 (2024). After this court lifted its stay, Cornelius submitted an amended brief.

II. ANALYSIS

Cornelius asserts claims of both statutory and common law negligence, whose duty of care arises under RCW 28B.10.900-.903 and WAC 504-26-206, and Restatement (Second) of Torts § 344, respectively.[2]

[2] In his original appellate brief, Cornelius asserted claims based on Restatement (Second) of Torts § 315(b) (Am. Law Inst. 2012) and Restatement (Third) of Torts Liability for Physical and Emotional Harm § 40 (Am. Law Inst. 1965), alleging a special relationship between students and WSU. However, his amended brief omitted his earlier § 315(b) and § 40 arguments. At oral argument, Cornelius' counsel also conceded that he could not "see a circumstance in which [Restatement (Second) of Torts §] 315 applies" after Barlow. Wash. Ct. of Appeals

As a preliminary note, Cornelius claims that Washington's anti-hazing laws, RCW 28B.10.900-.903 and WAC 504-26-206, create an implied cause of action sounding in tort, specifically permitting the negligence claim he here brings. As to the duty element of that claim, we understand Cornelius' claim to be, as stated in his complaint, that WSU owed him a duty of care to inter alia "vigorously supervise, monitor, train and enforce anti-hazing University policies and procedures, as well as state statues." As more succinctly stated in his appellate briefs, he claims WSU breached this statutory duty of care to Cornelius by failing to "prevent" hazing. In other words, even allowing that some implied cause of action may arise statutorily, the specific duty Cornelius claims he is owed is a duty to prophylactically monitor and prevent hazing.

In an opinion filed contemporaneously with the present one, this court rejected a similar argument, holding that:

> former RCW 28B.10.901 provides a specific remedy against individuals who conspire to haze others (criminal punishment), against any organization, association, or student living group that knowingly permits hazing (strict civil liability), and against the directors of such entities (individual liability). But the antihazing statutes do not provide a tort remedy against a university that fails to prevent its students from being hazed. *Nor does the legislative history suggest such a remedy.* In short, the provision of specific remedies for acts of hazing is evidence that the legislature intended to limit tort remedies to those who actually participated in hazing—not universities.

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oral argument, Austin Cornelius v. Wash. State Univ., No. 84657-4-I (November 1, 2024), at 10 min., 20 sec. through 10 min., 30 sec. video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024111101/?eventID=2024111101. We consider those arguments abandoned and will discuss them no further. Blue Spirits Distilling, LLC v. Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 794, 478 P.3d 153 (2020).

Martinez v. Wash. State Univ., No. 83853-9, slip op. at 25-26 (Wash. Ct. App. January 21, 2025) (emphasis added).

As such, we need and will only address whether WSU owed Cornelius a duty under Restatement (Second) of Torts § 344. See Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) ("'Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.'") (quoting Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 68, 1 P.3d 1167 (2000)). We hold, on the facts Cornelius proffers here, WSU owed him no such duty under Restatement (Second) of Torts § 344.

A. Summary Judgment Standard

In an appeal from summary judgment, we review de novo whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); see Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

To determine whether there is a genuine issue of material fact, "[w]e consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party," here Cornelius. Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996); Ranger Ins. Co., 164 Wn.2d at 552. The "'function of a summary judgment proceeding, or a judgment on the pleadings is to determine whether or not a genuine issue of fact exists, not to determine issues

of fact.'" Haley v. Amazon.com Servs., LLC, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022) (quoting State ex rel. Zempel v. Twitchell, 59 Wn.2d 419, 425, 367 P.2d 985 (1962)). Like the superior court, we "may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact." Id.

Summary judgment is appropriate for resolving pure questions of law as well. Solnicka v. Safeco Ins. Co. of Ill., 93 Wn. App. 531, 533, 969 P.2d 124 (1999). Finally, "[w]e may affirm a trial court's decision on a motion for summary judgment on any ground supported by the record." Port of Anacortes v. Frontier Indus., Inc., 9 Wn. App. 2d 885, 892, 447 P.3d 215 (2019).

B. Duty of Care Under *Restatement (Second) of Torts* § 344[3]

1. *Barlow* and *Restatement (Second) of Torts* § 344

"'In all negligence actions the plaintiff must prove the defendant owed the plaintiff a duty of care.'" Washburn v. City of Federal Way, 169 Wn. App. 588, 610, 283 P.3d 567 (2012) (quoting Donaldson v. City of Seattle, 65 Wn. App. 661, 666, 831 P.2d 1098 (1992)). "The determination of whether a duty exists is a question of law, which is reviewed de novo." Barlow, 2 Wn.3d at 589. Even so, a "duty

[3] WSU claims that Cornelius "failed to preserve this as an issue" as he "failed to make a Restatement-based premises liability claim to the trial court about the on-campus marches." While that may be strictly true, "a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." Bennett v. Hardy 113 Wn.2d 912, 918, 784 P.2d 507 (1990). Both Cornelius and WSU referenced Restatement (Second) of Torts § 344 in arguments before the superior court, albeit for different uses. Regardless, as the issue is fully and competently briefed, we choose to exercise our discretion to consider whether WSU owed Cornelius a duty under Restatement (Second) of Torts § 344. RAP 2.5(a) ("The appellate court *may* refuse to review any claim of error which was not raised in the trial court.") (emphasis added).

arises from the facts presented," meaning "a challenge to whether the defendant owes a duty to a plaintiff sometimes requires a determination whether facts can be proved that give rise to the alleged duty. In such cases, the issue of duty does not present a pure question of law." Washburn, 169 Wn. App. at 610-611.

Our Supreme Court in Barlow addressed two questions certified by the United States Court of Appeals for the Ninth Circuit. 2 Wn.3d at 586-87. The principles of Restatement (Second) of Torts § 344 guided the Court's determination of those questions. Id. at 590. That section states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 344). Stated generally, our Supreme Court held that Restatement (Second) of Torts § 344 is an exception to the "general rule [] that people and businesses have no duty to aid or protect others from harm." Id. at 589.

More specifically, the first question the Ninth Circuit certified was whether Washington "recognizes a special relationship between a university and its students, giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students." Id. at 586-87. Our Supreme Court answered affirmatively, holding that "that relationship is defined and

anchored in the common law as provided in Restatement (Second) of Torts § 344." Id. at 587.

The second question the Ninth Circuit certified was "what is the measure and scope of that duty?" Id. Our Supreme Court answered that, as universities have "no ability to control off-campus, non-school-sponsored interactions . . ., the duty does not extend to the choices or activities under a student's control." Id. at 597. In turn, the Court held that a "university's duty is limited to where a student is *on campus for school related purposes* or *participating in a school activity*." Id. (emphasis added). Covered school purposes and activities include "university sponsored and controlled events." Id. at 586.

Our Supreme Court further held that "foreseeability does not establish duty . . . unless a special relationship exists with the victim or the perpetrator." Id. at 595. There, it was immaterial that "WSU knew about [the perpetrator's] past behavior" from prior misconduct. Id. Instead, "[o]ur cases have recognized such a special relationship in only limited circumstances, none of which apply in the situation presented [t]here, at an off-campus party." Id.

In short, universities and colleges do owe a duty of care to their students under Restatement (Second) of Torts § 344, but the duty is "limited to where a student is on campus for school related purposes *or* participating in a school activity." Id. at 597 (emphasis added).

2. Applying *Barlow* to Cornelius' Theory and Facts He Proffers

Cornelius argues, even in light of Barlow, that WSU owed him a duty of care under Restatement (Second) of Torts § 344 to have monitored and prevented the

hazing he experienced both off campus at the AKL Chapter's house and on campus when he was forced to march from "'study tables'" at a WSU library to the AKL Chapter's house to be further hazed. We address each in turn.

a. AKL Chapter House

Cornelius offers the following facts to establish that the hazing at the AKL Chapter's house were university sponsored and controlled events, triggering a duty of care under Barlow:

i. "WSU students are . . . subject to individual discipline under the Student Code of Conduct for 'off campus' activity at a Greek Row fraternity or sorority."
ii. AKL Chapter's "troubled history at WSU, having been previously suspended from the campus in 2007 due to 'drug and alcohol allegations against it.'" WSU's sanctions included "loss of recognition for a period of at least five years."
iii. Broader disciplinary issues within WSU's "Greek Row," including that "*18 out of 18* Greek Row chapters had received sanctions for alcohol violations in the past year."
iv. Greek Row and the AKL Chapter being "physically proximate to buildings on WSU Pullman's campus."
v. "WSU has a staff dedicated to promoting and sustaining fraternities and sororities on campus—the Center for Fraternity and Sorority Life ('CFSL')."
vi. "WSU aggressively promotes Greek life and encourages students and prospective students to join fraternities and sororities" by citing "higher graduate rates, higher acceptance rates into graduate programs, more and better job opportunities through professional networking systems, and other social and academic benefits."
vii. Cornelius' testimony that WSU's "'massive presentations'" and "'tour[s of] every fraternity house'" during "'rush week'" led him to join the AKL Chapter. These tours included assurances by members of the AKL Chapter that "'there's no hazing'" and that "'[t]here will be no hazing. We are nontolerant. We don't have a problem with hazing. There is no hazing.'"[4]

[4] Cornelius also cites to a "Relationship Agreement" between the AKL Chapter and WSU. Amended Br. of App. at 5-7 (citing CP 1802, 1806-10). However, Cornelius offers little, if any, substantive analysis beyond listing the contents of this

In sum, Cornelius argues "WSU has specifically exerted significant control over AKL." And he avers that his "symbiotic relationship . . . establishes that the Chapter was a school-sponsored activity" under Barlow and Restatement (Second) of Torts § 344.[5] We disagree.

Our Supreme Court in Barlow rejected claims based on facts similar to the first seven sets of facts enumerated above. The Court in Barlow rejected the argument, as in bullet (i), that codes of conduct which address off campus conduct establish a university's duty under Restatement (Second) § 344. 2 Wn.3d at 597. The Court explained that the "code of conduct does not create control of students' behavior in a preventative way," making it "irrelevant to establishment of a duty." Id. As such, Cornelius' reliance on WSU's code of conduct is inapposite for establishing that the activities at a fraternity house were university sponsored and controlled, thereby creating a duty.

Next, contrary to bullets (ii) and (iii), our Supreme Court in Barlow stated

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agreement and generally citing WAC 504-26-206(3)(b). Amended Br. of App. at 5-7.

[5] Cornelius also cites to former WAC 504-24-030 (2020) as a "regulation, that, at the time, provided that you had an exception from the mandatory freshman on campus residence requirement for fraternities." Wash. Ct. of Appeals oral argument, supra at 5 min., 39 sec. through 5 min., 49 sec. Indeed, in 2023, the regulation was amended to strike the definition of "[u]niversity-recognized housing" to include "university approved fraternities" and that living in a fraternity house satisfied the requirement that all first-year students live in officially recognized" housing. Wash. St. Reg (WSR) 23-07-069, § 504-24-030 (Apr. 13, 2023). Still, Cornelius' reliance on this regulation is quickly disposed of, as our Supreme Court in Barlow rejected the argument that a university owes a duty of care to a student simply because it "is involved in aspects of student life outside of the academic sphere, such as providing basic necessities," including even "on-campus housing," let alone off campus housing, as here. 2 Wn.3d at 597.

that "foreseeability does not establish duty" because, even if a "party knows that a person may commit a crime against another, that party has no duty to act unless a special relationship exists with the *victim or the perpetrator*." 2 Wn.3d at 595 (emphasis added). There, the Court held WSU had no duty over off campus and non-sponsored conduct even when WSU received two complaints about the same perpetrator soon before the incident.

Here, Cornelius concedes the AKL Chapter's house was off campus. Cornelius makes claims of past misconduct, which was more generalized than the plaintiff presented in Barlow. Thus, Cornelius' reliance on the general disciplinary history of the AKL Chapter or Greek row is inapposite for establishing a duty.

Moreover, a residence's mere proximity to campus is expressly immaterial under Barlow to creating a duty, as the test is whether "a student is *on campus* for school related purposes *or* participating in a school activity." 2 Wn.3d at 597 (emphasis added). Thus, Cornelius' assertion in bullet (iv) that the AKL Chapter's house was "physically proximate" to campus simply does not establish a duty under Barlow.

Next, and contrary to bullets (v), (vi), and (vii) and the general claim that WSU has a duty to monitor or prevent hazing because it "promotes" Greek life, the Court in Barlow held that universities do not owe a duty simply because they "provid[e] basic necessities" such as "opportunities for social interaction." 2 Wn.3d at 597. In turn, these facts do not establish WSU had any actual power to thereby control students' actions and sponsored a fraternity's activities at a private off campus residence at the time of the hazing, as Barlow requires, even if a jury found

WSU encouraged participation in Greek life. Id.

In short, none of the facts Cornelius proffers creates a genuine issue of material fact that WSU controlled and sponsored the abusive students' off campus interactions with Cornelius. As the Court in Barlow explained, "a university simply has no power to dictate students' movements off campus and away from the oversight of campus security and administration." 2 Wn.3d at 597. Thus, "the duty does not extend to the choices or activities under a student's control." Id.

Therefore, we hold that summary judgment was proper as this portion of Cornelius' claim. His proffered facts, even if viewed in a light most favorable to him, fail to establish a genuine issue of material fact that WSU owed a duty of care under Restatement (Second) § 344 to monitor or prevent potential abuse by students off campus. CR 56(c); Ranger Ins. Co., 164 Wn.2d at 552; Martinez, No. 83853-9, slip op. at 35-36 (similarly holding that WSU owed no duty under Restatement (Second) § 344 to protect a student from hazing at an off campus fraternity).

b. Library Marches

Again, Cornelius testified that the AKL Chapter also hosted library "study tables," after which "pledges were then lined up in the middle of the library (located in the center of the WSU Pullman campus), marched back to the AKL house across campus, and hazed additionally." Specifically, during these marches, Cornelius states "he was subject to being yelled at and told to have his head down and look at the ground" and, upon entry to the house, the abuse continued

Based on these facts, Cornelius first generally argues that "WSU made its

facilities like the library available for the Chapter to engage in hazing," meaning "WSU owed [him] a Restatement § 344 duty of care arising out of the use of its premises by the Chapter."

Indeed, a jury could find that the marches were literally "on campus," in the sense the abusers marched their pledges across campus from the library to the AKL Chapter's off campus house. But, for a court to send the claim to a jury, Cornelius would also have to create a genuine issue of material fact that this action occurred "for school related purposes." Barlow, 2 Wn.3d at 597.

Here, there is no evidence in the record these "study tables" or marches were for "school related purposes," as that term is commonly understood. Id. Webster's defines "purpose" as "something one sets before himself as an object to be attained: an end or aim to be kept in view." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1847 (1993). In other words, Cornelius has established, as he must, no connection between the marches and a school related aim, object, or end. Welch v. Brand Insulations, Inc., 27 Wn. App. 2d 110, 531 P.3d 265 (2023) (explaining the burden on the nonmoving party). It is unclear what Cornelius means by a university "making a facility available," but there is nothing in the record that would permit us to hold that WSU's school library was created for the purpose or aim of hosting marches to a fraternity house.[6] In turn, Cornelius

[6] At oral argument, this court asked Cornelius' counsel to identify his client's best evidence that the library marches were for "school related purposes." Wash. Ct. of Appeals oral argument, supra at 4 min., 9 sec. through 4 min., 13 sec. Cornelius primarily reiterated evidence discussed above, from the house's proximity to campus, WSU promotion of Greek life, recognition agreement, to past incidents and discipline within the AKL Chapter and Greek row. Id. at 4 min., 13 sec. through 5 min., 16 sec. (proximity, WSU promotion), 6 min., 3 sec. through 6 min., 40 sec.

has failed to establish a genuine issue of material fact as no reasonable juror could conclude the study hall event or marches were in furtherance of a school related purpose. Ranger Ins. Co., 164 Wn.2d at 552.

Even assuming arguendo that the marches could be characterized as on campus for some school related purpose under Barlow (e.g., as some generalized support of the Greek system WSU benefits from), Cornelius still failed to establish foreseeability under comment f of Restatement (Second) of Torts § 344. As our Supreme Court discussed in McKown v. Simon Prop. Grp., Inc., comment f of Restatement (Second) of Torts § 344 "provides that[,] to the extent that a duty is owed, it is a limited duty based on foreseeability," meaning "foreseeability is not merely used to determine the scope of a duty already owed, it is a factor in determining whether the duty is owed in the first place." 182 Wn.2d 752, 768, 344 P.3d 661 (2015).

Comment f to Restatement (Second) of Torts § 344 further explains that a "'possessor . . . is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person *are occurring, or are about to occur*.'" Id. (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. f). The possessor "'may, however, know or have reason to *know, from past experience*, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor'" based on the possessor's "'*place or character of his business*, or *his past experience*.'" Id.

(agreement), 8 min., 5 sec. through 8 min., 50 sec. (incidents). For reasons similar to those discussed above, none of that evidence creates a genuine issue of material fact that the march advanced a school related purpose.

(emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. f).

Cornelius offers numerous facts to establish the foreseeability of, or WSU's knowledge of, the library marches, including:

> (a) Again, the past incidents or disciplinary issues within WSU's broader Greek system, including fatal hazing incidents in other fraternities and the aforementioned statistic that 18 out of 18 Greek Row chapters were sanctioned for alcohol violations in the past year.
> (b) Again, the AKL Chapter's past-disciplinary issues, such as the 2007 revocation of its recognition.
> (c) The declaration from Dr. Norman Pollard, a putative expert witness retained by Cornelius.
> (d) The unsupported claim that "cross campus" and other unusual marches occurred "*for years*" and "would be noteworthy to University staff."
> (e) Also, without further citation to the record, the claim that "WSU library staff were aware the Chapter used its facilities for a 'study table' and it was the starting point of the march."
> (f) The fact that a WSU campus map demonstrates the distance between the WSU library and the AKL Chapter house was "considerable."

Even viewing these assertions in a light most favorable to Cornelius, we hold they are insufficient to create a genuine issue of material fact on foreseeability. CR 56(c); Ranger Ins. Co., 164 Wn.2d at 552.

Our Supreme Court observed that even in the context of criminal acts, if the act "that injures the plaintiff is not sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, and sufficiently numerous, then the act is likely unforeseeable as a matter of law under the prior similar incidents test." McKown, 182 Wn.2d at 772.

Here, the pasts incidents at the AKL Chapter house in 2007 and on Greek row generally, summarized in bullets (a) and (b), are not "sufficiently similar" or "close in time" to the marches to put WSU on notice. Id.

Further, Cornelius' reliance on Dr. Pollard's testimony, in bullet (c), is misplaced. Dr. Pollard states he has "special expertise in the field of hazing and risk management." His declaration further claims WSU "knew, or at the very least should have known, that 18- to 22-year old fraternity members . . . could not be entrusted with the health and safety of incoming members, and were not adequately trained." However, the declaration does not specifically discuss the AKL Chapter, the library marches, or WSU's knowledge of either, directly or based on any specific past experiences. Moreover, the declaration provides no evidence that these specific events "are occurring, or are about to occur" or are somehow part of a history of this type of hazing on campus. Restatement (Second) of Torts § 344 cmt. f. Cornelius points to no such evidence in the record. Cowiche Canyon Conservancy v. Bosley,118 Wn.2d 801, 819, 828 P.2d 549 (1992) (the court is not required to search the record to locate the portions relevant to a litigant's arguments). In short, Dr. Pollard's generalized assertions are insufficient to establish foreseeability for the library marches under McKown, 182 Wn.2d at 722.

Relatedly, Cornelius' unsupported assertions within bullets (d) and (e), as well as his generalized citation to a WSU campus map in bullet (f), are insufficient as "[m]ere speculation cannot support or defeat a motion for summary judgment." Umpqua Bank v. Gunzel, 19 Wn. App. 2d 16, 34, 501 P.3d 177 (2021).

Thus, even if the library marches arguendo were done to advance some school purpose, Cornelius still fails to establish a genuine issue of material fact as to whether the marches were foreseeable under Restatement (Second) of Torts § 344, comment f. And, thus, summary judgment was appropriate. CR 56(c);

Ranger Ins. Co., 164 Wn.2d at 552.

III. CONCLUSION

We affirm the superior court's order granting summary judgment in favor of WSU.[7]

Díaz, J.

WE CONCUR:

Mann, J.

[7] Cornelius filed three statements of additional authorities. WSU moved to strike the first two statements and filed a response to the third. We deny WSU's motions as moot.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AUSTIN CORNELIUS, an individual, Appellant, v. WASHINGTON STATE UNIVERSITY, a public university, Respondent, ETA OF ALPHA KAPPA LAMBDA, a Washington corporation d/b/a ALPHA KAPPA LAMBDA, and ALPHA KAPPA LAMBDA, a national organization, MAXWELL H. ZIMMERMAN; JOHN STACK; KYLE THOMAS CATEY; MICHAEL GRAY; JOHN ZENDER; ADAM TAPLETT; DEREK ANDREW THIEL; AND DOES 1 THROUGH 15, Defendants.	No. 84657-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Austin Cornelius, filed a motion for reconsideration of the opinion filed on January 21, 2025, in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

Washington Administrative Code
Title 504. Washington State University
Chapter 504-26. Standards of Conduct for Students
Part III. Prohibited Conduct

WAC 504-26-206

504-26-206. Hazing.

Currentness

(1) Hazing includes any act committed as part of a person's recruitment, initiation, pledging, admission into, or affiliation with a registered student organization, athletic team, or living group, or any pastime or amusement engaged in with respect to such an organization, athletic team, or living group that causes, or is likely to cause, bodily danger or physical harm, or psychological or emotional harm, regardless of the person's willingness to participate.

(2) Hazing activities may include, but are not limited to:

(a) Use of alcohol during activities targeted towards new members;

(b) Striking another person whether by use of any object or one's body;

(c) Creation of excessive fatigue;

(d) Physical and/or psychological shock;

(e) Morally degrading or humiliating games or activities;

(f) Causing, directing, coercing, or forcing a person to consume any food, liquid, alcohol, drug, or other substance regardless of the person's willingness to participate;

(g) Unreasonable or unnatural physical activity.

(3) Hazing does not include practice, training, conditioning and eligibility requirements for customary athletic events such as intramural or club sports and NCAA athletics, or other similar contests or competitions.

(4) Hazing is prohibited both on and off campus.

Credits

Statutory Authority: RCW 28B.30.150. WSR 24-23-093, § 504-26-206, filed 11/19/24, effective 12/20/24; Statutory Authority: RCW 28B.30.150. WSR 22-23-142, S 504-26-206, filed 11/21/22, effective 1/1/23; Statutory Authority: RCW 28B.30.150. WSR 21-07-057, S 504-26-206, filed 3/15/21, effective 4/15/21; Statutory Authority: RCW 28B.30.150. WSR 21-09-007, S 504-26-206, emergency action filed and effective 4/8/21; Statutory Authority: RCW 28B.30.150. WSR 21-01-093, S 504-26-206, emergency action filed and effective 12/11/20; Statutory Authority: RCW 28B.30.150. WSR 20-17-098, S 504-26-206, emergency action filed and effective 8/14/20; Statutory Authority: RCW 28B.30.150. WSR 18-23-083, S 504-26-206, filed 11/19/18, effective 12/20/18; Statutory Authority: RCW 28B.30.150. WSR 06-23-159, S 504-26-206, filed 11/22/06, effective 12/23/06.

Current with amendments adopted through the 25-03 Washington State Register, dated February 5, 2025. Some sections may be more current. Please consult the credit on each document for more information.

WAC 504-26-206, WA ADC 504-26-206

End of Document

Washington Administrative Code
Title 504. Washington State University
Chapter 504-26. Standards of Conduct for Students
Part IV. Procedures

WAC 504-26-425

504-26-425. Sanctions.

Currentness

(1) Publication of guidelines for sanctioning. Sanctioning guidelines and other information regarding sanctioning must be published on the university website. Guidelines must explain in plain language the types of sanctions that a respondent may face for a particular violation and the factors that are used to determine the sanction(s) assigned for a particular violation.

(2) Factors for sanctioning must include, but not be limited to, the following:

(a) Conduct record. Any record of past violations of the standards of conduct, and the nature and severity of such past violations;

(b) Malicious intent. If a respondent is found to have intentionally selected a complainant based upon the respondent's perception of the complainant's race, color, religion, national or ethnic origin, age, sex/gender, marital status, status as an honorably discharged veteran or member of the military, sexual orientation, genetic information, gender identity/expression, or mental, physical, or sensory disability (including disability requiring the use of a trained service animal), such finding is considered an aggravating factor in determining a sanction for such conduct;

(c) Impact on complainant and/or university community;

(d) Applicable local, state, or federal laws that define sanctioning.

(3) Effective date of sanctions. Except as provided in WAC 504-26-420(2), sanctions are implemented when a final order becomes effective. If no appeal is filed, an initial order becomes a final order on the day after the period for requesting review has expired. (See WAC 504-26-420.)

(4) Types of sanctions. The following sanctions may be assigned to any respondent found to have violated the standards of conduct. More than one of the sanctions listed below may be assigned for any single violation:

(a) Warning. A notice in writing to the respondent that the respondent is violating or has violated the standards of conduct.

(b) Probation. Formal action placing conditions upon the respondent's continued attendance, recognition, or registration at the university. Probation is for a designated period of time and warns the respondent that suspension, expulsion, loss

of recognition, or any other sanction outlined in this section may be assigned if the respondent is found to have violated the standards of conduct or any institutional regulation(s) or fails to complete any conditions of probation during the probationary period. A respondent on probation is not eligible to run for or hold an office in any registered student group or organization; they are not eligible for certain jobs on campus including, but not limited to, resident advisor or orientation counselor; and they are not eligible to serve on the university conduct or appeals board.

(c) Loss of privileges. Denial of specified privileges for a designated period of time.

(d) Restitution. Compensation for loss, damage, or injury. This may take the form of appropriate service and/or monetary or material replacement.

(e) Education. Requirement to successfully complete an educational project designed to create an awareness of the respondent's misconduct.

(f) Community service. Assignment of service hours (not to exceed 80 hours per respondent or per member of a registered student organization).

(g) University housing suspension. Separation of the respondent from a residence hall or halls for a definite period of time, after which the respondent may be eligible to return. Conditions for readmission may be specified.

(h) University housing expulsion. Permanent separation of the respondent from a residence hall or halls.

(i) University suspension. Separation of the respondent from the university for a definite period of time. The respondent may be required to request readmission after completing a suspension per other university policy.

(j) University expulsion. Permanent separation of the respondent from the university. Also referred to as university dismissal. The terms are used interchangeably throughout this chapter.

(k) Revocation of admission and/or degree. Admission to or a degree awarded from the university may be revoked for fraud, misrepresentation, or other violation of law or standard of conduct in obtaining the degree or admission, or for other serious violations committed by a respondent before awarding of the degree.

(l) Withholding degree. The university may withhold awarding a degree otherwise earned until the completion of the process set forth in these standards of conduct, including the completion of all sanctions assigned, if any.

(m) Trespass. A respondent may be restricted from any or all university premises based on their misconduct.

(n) Loss of recognition. A registered student organization's recognition (or ability to register) may be withheld permanently or for a specific period of time. Loss of recognition is defined as withholding university services, privileges, or administrative approval from a registered student organization. Services, privileges, and approval to be withdrawn may include, but are not limited to, intramural sports (although individual members may participate), information technology

services, university facility use and rental, student engagement office organizational activities, and their liaison relationship with the center for fraternity and sorority life.

(o) Hold on transcript and/or registration. A hold restricts release of a respondent's transcript or access to registration until satisfactory completion of conditions or sanctions assigned by a conduct officer or university conduct board. Upon proof of satisfactory completion of the conditions or sanctions, the hold is released.

(p) No contact directive. A prohibition of direct or indirect physical, verbal, and/or written contact with another individual or group.

(q) Fines. Previously established and published fines may be assigned. Fines are established each year prior to the beginning of the academic year and are approved by the vice president for student affairs.

(r) Additional sanctions for hazing. In addition to other sanctions, a respondent who is found responsible for hazing forfeits any entitlement to state-funded grants, scholarships, or awards for a specified period of time, in accordance with RCW 28B.10.902. Any registered student organization that is found responsible for hazing must lose recognition for a specified period of time.

(s) Remedies. Sanctions designed to restore or preserve a complainant's equal access to the university's educational programs or activities.

Credits

Statutory Authority: RCW 28B.30.150. WSR 24-23-093, § 504-26-425, filed 11/19/24, effective 12/20/24; Statutory Authority: RCW 28B.30.150. WSR 22-23-142, S 504-26-425, filed 11/21/22, effective 1/1/23; Statutory Authority: RCW 28B.30.150. WSR 21-07-057, S 504-26-425, filed 3/15/21, effective 4/15/21; Statutory Authority: RCW 28B.30.150. WSR 21-09-007, S 504-26-425, emergency action filed and effective 4/8/21; Statutory Authority: RCW 28B.30.150. WSR 21-01-093, S 504-26-425, emergency action filed and effective 12/11/20; Statutory Authority: RCW 28B.30.150. WSR 20-17-098, S 504-26-425, emergency action filed and effective 8/14/20; Statutory Authority: RCW 28B.30.150. WSR 18-23-083, S 504-26-425, filed 11/19/18, effective 12/20/18.

WAC 504-26-425, WA ADC 504-26-425

End of Document

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 84657-4-I to the following:

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Original E-filed via appellate portal with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 12, 2025 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

March 12, 2025 - 12:10 PM

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Appellate Court Case Number:	84657-4
Appellate Court Case Title:	Austin Cornelius, Appellant v. Washington State University, et al, Respondents

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Petition for Review

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